

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	Criminal No. 06-26
	:	
vs.	:	Honorable Arthur J. Schwab
	:	
CYRIL H. WECHT,	:	[Electronically filed]
	:	
Defendant.	:	

**DEFENDANT’S BRIEF IN SUPPORT OF HIS MOTION TO
DISMISS THE INDICTMENT AND TO PRECLUDE THE
GOVERNMENT FROM FURTHER PROSECUTION IN VIOLATION
OF THE PROHIBITION AGAINST DOUBLE JEOPARDY**

Defendant, Cyril H. Wecht, offers his Brief in Support of his Motion to Dismiss the Indictment and to Preclude the Government From Further Prosecution in Violation of the Prohibition Against Double Jeopardy for the conduct alleged in the Indictment on the basis that any such further prosecution is barred by the Fifth Amendment prohibition against double jeopardy.

I. Introduction

In a case with so complex a procedural history, the matter at issue is remarkably straightforward and constitutionally case-dispositive.

On Thursday, April 3, 2008, after a multi-week trial, the jury suggested that it was deadlocked. In response, the Court consulted with counsel and then polled the jurors. Thereafter, the Court gave them a charge along the lines of the one articulated in the Third Circuit’s Model Criminal Jury Instruction 9.05, and sent them back to deliberate. The jury deliberated for a brief period thereafter and adjourned for the week.

On Monday, April 7, 2008, jury deliberations resumed. The following day, on April 8, 2008, the jurors again sent a note to the Court. This time, however, and with no prior notice regarding its purpose, the Court merely issued an ECF notice requiring the Defendant Dr. Cyril H. Wecht and the Government to appear shortly thereafter in the courtroom. After the parties convened as ordered, the Court began by instructing all present that they must remain

quiet and make no motions or objections and that, should they be unwilling to abide by that order, they should leave the courtroom. The Court then announced that the jurors were at a “deadlock” but did not question the foreperson or poll any of the jurors individually to confirm that that they were irremediably deadlocked. The Court did not allow counsel to confer with him about whether there might be alternatives to a mistrial or whether they consented to the mistrial. The Court made no attempt of any sort to determine if there was “manifest necessity” for a mistrial or any alternative to the drastic step of declaring a mistrial, and long-standing case law and an unambiguous rule of criminal procedure mandated that the Court do so.

Instead, before even formally declaring a mistrial and discharging the jury, the Court turned to the government’s counsel and asked if the government were prepared immediately to retry the case – and the government indicated that it was and is. The Court then proceeded immediately to schedule the retrial for May 27, 2008. All of this occurred with the still-empanelled jurors sitting in the courtroom listening.

The government, which no doubt knows what procedure is required before a district judge may declare a mistrial and what the significant consequences of erring in that process would be, made no effort to correct the Court’s erroneous approach to declaring a mistrial and indeed ratified it by their every act. The government, which to overcome the Fifth Amendment’s guarantee against Double Jeopardy bears the burden of proving that a mistrial was accompanied by proper procedure and “manifest necessity,” did not in any sense indicate to the Court that it was erring in so fundamental a way that it would create an indefensible bar to any retrial. Instead, the government’s counsel, Stephen S. Stallings, used his first opportunity to speak only to confirm, without any review of the first trial or any apparent reflection, that the government would go forward to retry Dr. Wecht.

There were fundamental errors here, and they have constitutional ramifications. Jeopardy attached on January 23, 2008. As a matter of law, the mistrial entered by this Court was

improper to carve out any exception to the Fifth Amendment's absolute mandate that forbids that "any person be subject for the same offence to be twice put in jeopardy of life or limb."¹

II. Background of the Case

The Court is familiar with the background of this case and, so, Dr. Wecht will focus this recitation of the background of the case on those matters particularly important to the present motion.

After a significant amount of pretrial activity, the criminal trial began with jury selection on January 10, 2008. Jury selection concluded on January 23, 2008, and the jurors were sworn that day. (Jan. 23, 2008, Tr. at 198) The trial began with opening statements on January 28, 2008. On March 17, 2008, counsel delivered closing arguments and the Court instructed the jury. The jury began its deliberations the next day.

The next morning, the jurors requested that the Court provide them with copies of certain statutes relating to the charges against Dr. Wecht. (March 18, 2008, Tr. at 2) After consultation with counsel, the Court denied the request. (March 18, 2008, Tr. at 9-10)

The following week, the jury sent the Court a note that read as follows:

Out of the 41 counts, if any one or more counts the jury cannot come to unanimous agreement on, does that constitute a hung jury?

(Court Exh. 5 at 1) Once again, the Court consulted with counsel and, with their consent, sent the following written response to the jury:

The answer to your question is no. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself but only do so after an impartial consideration of the evidence in the case with your fellow jurors.

¹ During the April 8, 2008, proceeding, the Court instructed that the defense file any motions by noon on April 18, 2008. Dr. Wecht intends to file additional motions, and he will do so in a timely fashion. Because this motion focuses on a discrete issue, Dr. Wecht is filing it separately and before the deadline.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

(Court Exh. 5 at 2)

A week later, the jury sent another note to the Court. (April 3, 2008, Tr. at 2) The note included the following language:

After considering all counts and in a variety of ways, and in reconsideration of all of individual opinions according to the court instructions – we have unanimously agree [*sic*] we have reached an impasse & respectfully request direction from the Court. We agree additional deliberation would not be helpful.

(Court Exh. 12) The Court told counsel that he was inclined to poll the jurors individually to confirm that they were “hopelessly deadlocked” and that no further deliberations would lead to a unanimous verdict and then to read to the jury the “standard deadlock jury charge” in Third Circuit Model Instruction 9.05. Before he took those steps, however, the Court once again allowed both the government and the defense time to consider the issue.

After counsel deliberated, the government’s counsel, AUSA Stallings, suggested to the Court that it send to the jury a note asking if it could reach a unanimous verdict on *any* of the counts because “the government is not convinced that the jury understands or perhaps is apprised that a partial verdict is a possibility.” (April 3, 2008, Tr. at 5) AUSA Stallings suggested that, if the jury responded to the proposed written question with “no,” that the Court should return the jury to the courtroom and give it an *Allen* charge but not conduct individual *voir dire* polling. (*Id.*)² Defense counsel objected to the government’s proposed course of action. He suggested instead that the Court bring the jurors into the courtroom and ask them individually if they thought that additional deliberations would break the impasse and, if they said that more

² In suggesting that the Court offer a supplemental charge according to *Allen v. United States*, 164 U.S. 492 (1896), the government apparently did not realize that this Court has prohibited the use of such charges. See *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969).

deliberations would not likely be helpful, to discharge the jury and declare a mistrial. (April 3, 2008, Tr. at 5-6)

The Court told counsel he would bring in the jurors, poll them, give them the Instruction-9.05 charge and then send them back to deliberate. (April 3, 2008, Tr. at 7)³ The Court then had the jurors returned to the courtroom and polled them individually. Each juror responded that he or she believed the jury was hopelessly deadlocked such that additional deliberations would not be helpful. (April 3, 2008, Tr. at 10-13) The Court then read to them from the Third Circuit's Model Criminal Jury Instruction 9.05 and sent them back to their deliberations. (April 3, 2008, Tr. at 13-14).

After the jurors left the courtroom, AUSA Stallings renewed his request that the Court ask the jurors collectively if they could reach a partial verdict. The Court denied the request. (April 3, 2008, Tr. at 14-15) A short time later, the Court recessed the matter until the following Monday, April 7, 2008. (April 3, 2008, Tr. at 15-16)⁴

The jury deliberated for four hours on Monday, April 7, 2008. At 8:53 the next morning, April 8, 2008, the Court entered the following text-only entry on its docket (which then generated an ECF notice to counsel): "Counsel for the Government and Defense and all parties are hereby ORDERED to appear today, 04/08/08 at 9:15 AM. Signed by Judge Arthur J. Schwab on 04/08/08."

³ After the Court told counsel how he would proceed, defense counsel suggested that the Court suggest to the jurors that, after some set period of time, they report back on whether they were past their impasse so that the jurors would not wonder if they might be required to continue deliberating for weeks while still at an impasse. (April 3, 2008, Tr. at 7) the Court refused to do so. (*Id.*)

⁴ On the afternoon of Thursday, April 3, 2008, the government filed a motion asking that the Court give the jury a partial-verdict instruction (in essence, restating in writing the motion made orally in court earlier that day). (Doc. No. 850). In a written filing on April 4, 2008, Dr. Wecht objected to the proposed instruction and cross-moved for a mistrial. (Doc. No. 852) Later that day, the Court denied the government's partial-verdict request in a text-only docket entry. On Monday, April 7, 2008, the Court denied Dr. Wecht's motion for a mistrial in a text-only docket entry.

The Court opened the April 8, 2008, proceeding at 9:20 a.m. with the jury present. He proceeded as follows:

THE COURT: Good morning. Thank you all for gathering pursuant to the notice on the Electronic Case Filing system.

For your and the jury's safety and the preserved good order, I would ask that you follow the following instructions this morning:

Everyone should remain in their seats throughout this proceeding from now until when the jury and I exit the courtroom.

No one will be permitted to be running in and out of the courtroom as happened last week.

Secondly, I expect everyone to be quiet, and if anyone wants to make motions or objections to this proceeding or whatever, they may do so in writing on ECF, as we have done throughout the trial.

If anyone is unwilling to abide by these instructions, I will give you time now to exit.⁵

Thank you for your assistance and cooperation.

The jury has informed the bailiff that they remain hopelessly deadlocked and are unable to reach a unanimous verdict on the defendant's guilt on any of the 41 counts and are unable to reach a unanimous verdict on the defendant not being guilty of any of the 41 counts.

The jurors' note will be marked as Court Exhibit 13, and I have copies thereof, which you can pick up when we're done with this proceeding, which has deleted the names of presumably the foreperson and secretary.⁶

⁵ Following this statement, the Court paused to permit all present to consider the instruction and to give time to leave. As the charged defendant, neither Dr. Wecht nor his defense team could leave and had no choice but to abide by the order.

⁶ In its totality, the jury's final note read as follows:

Pursuant to court instructions the jury contends that we have exhausted all further deliberation efforts. We agree unanimously that we are unable to reach a verdict – on all 41 counts and are essentially deadlocked in the case of United States of America vs. Cyril H. Wecht.

(Court Exh. 13)

The names of the jurors have not been released pursuant to my Order of Court. Until the Third Circuit determines otherwise, that will remain in effect.

Thus, defendant is still charged with each of the 41 counts with the constitutional presumption of innocence as to each of the 41 counts.

It is the government's responsibility to decide whether or not to retry the defendant.

Does the government have a decision today whether the government will retry the defendant?

MR. STALLINGS: We do, Your Honor, and we will.

THE COURT: I would ask that by Friday at noon that the government file a notice as to which of the counts, which could be as few as one or as many as the 41, which of the counts will be tried in the retrial.

Is the government prepared to proceed immediately to retry the case?

MR. STALLINGS: We are, Your Honor.

THE COURT: Is the defense prepared to immediately retry the case?

MR. McDEVITT: We will have several motions to make before that happens.

THE COURT: Okay. Just for everyone's scheduling purpose, I will set the trial for May 7th – excuse me – May 27th, which is the day after Memorial Day, May 27, 2008, at nine a.m.

That should give defense and the government sufficient time to file whatever motions they wish to respectively file.

On behalf of the defendant, when would you like to file any motions you wish to file, sir?

MR. McDEVITT: I will need some time to think about that. This is quite a surprise.

THE COURT: Okay. I know everyone needs a little rest, so I appreciate that matter.

I would ask the defense, if you would kindly for me, please file any motions you have by noon on April 18, 2008.

If you find after reflection that date doesn't work for you, then just file an appropriate motion, and I will work with you in that regard.

I will send out a scheduling order as to the May 27th, 2008 date without prejudice to whatever defendant's motions will come before me.

Before I declare a mistrial and discharge the jury, I wish to express several things.

First of all, I want to thank our wonderful court reporters . . .

(April 8, 2008, Tr. at 2-5) (emphasis added) The Court then thanked various court personnel and the jurors. After concluding those remarks, he made the following statement: "I declare a mistrial. I discharge the jury and the alternate jury . . ." (April 8, 2008, Tr. at 8)⁷

III. Issue Presented

Whether the Court's improper declaration of a mistrial unsupported by "manifest necessity" bars the government from retrying Defendant Cyril H. Wecht because to do so would place him in jeopardy twice for the same alleged conduct and, therefore, violate the Fifth Amendment's Double-Jeopardy Clause.

IV. Law and Discussion

As the Third Circuit has recently reiterated, protections against double jeopardy are longstanding and important. *See United States v. Rivera*, 384 F.3d 49, 54 (3d Cir. 2004).

A. *The Court failed to comply with mandatory procedures before declaring a mistrial.*

The rule is well established that, when there has been a mistrial, double jeopardy bars a retrial unless there was "manifest necessity" for the retrial. The Supreme Court first made that point 184 years ago:

⁷ On April 9, 2008, the day after declaring the mistrial, the Court issued an extensive pretrial order directing, among other things, that the clerk of court issue 400 juror summonses essentially immediately. *See* Doc. No. 864. Also on April 9, 2008, Dr. Wecht filed a motion seeking a continuance of the date for the retrial. *See* Doc. No. 865. On April 11, 2008, the government filed formal notice of its intention to proceed against Dr. Wecht on all charges. *See* Doc. No. 867. As of the time Dr. Wecht is filing this motion, the government has not yet responded to the motion for a continuance, and the Court has not yet resolved that motion.

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, *taking all the circumstances into consideration*, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. *They are to exercise a sound discretion on the subject*; and it is impossible to define all the circumstances, which would render it proper to interfere. *To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes*; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner.

United States v. Perez, 22 U.S. (9 Wheat) 579, 580 (1824) (emphasis added).

The language of *Perez* remains the law, and it has given rise to both a mandatory rule of criminal procedure and a line of cases making clear that, when a court declares a mistrial on its own motion or the prosecution's motion, it must follow that procedure carefully to insure that there is "manifest necessity" to declare a mistrial. Federal Rule of Criminal Procedure 26.3 directs as follows:

Before ordering a mistrial, the court *must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives*.

Fed. R. Crim. P. 26.3 (emphasis added).⁸ In interpreting Rule 26.3, the Third Circuit has made clear that the rule is mandatory and directly linked to preservation of important, constitutional rights:

Critically, a mistrial must not be declared without prudent consideration of reasonable alternatives. Federal Rule of Criminal Procedure 26.3 requires that, "[b]efore ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives. The dialogue fostered by Rule 26.3 ensures that only those mistrials that are truly necessary will be granted. The Government bears the burden of demonstrating that, under the

⁸ The Supreme Court added Rule 26.3 in 1993 in response to cases such as *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990) (mistrial improper where district judge failed to consult with counsel), and *United States v. Bates*, 917 F.2d 388 (9th Cir. 1990) (same). See Advisory Committee Notes to Fed. R. Crim. P. 26.3. The advisory committee propounded the rule, and it described its purpose as "providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order." *Id.* (emphasis added).

circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial. Ultimately, however, the District Court must exercise prudence and care, giving due consideration to reasonably available alternatives to the drastic measure of a mistrial. Where a District Court *sua sponte* declares a mistrial in haste, without carefully considering alternatives available to it, it cannot be said to be acting under a manifest necessity. Any subsequent reprosecution under those circumstances is barred by the Double Jeopardy Clause.

Rivera, 384 F.3d at 56-57 (citations and quotations omitted). Indeed, the court of appeals has emphasized the constitutional implications of a mistrial not only in its reported decisions but also in the comments to its criminal jury instructions, which it promulgated just a year and a half ago.⁹ In the comment to Model Criminal Jury Instruction 9.06 (regarding discharge of a deadlocked jury), the drafting committee specifically recommended a four-step process for the district judge to follow *before* declaring a mistrial based on a hung jury:

First, to determine whether a supplemental charge is necessary, **the court should question the foreperson**, but must take steps to ensure that the foreperson does not reveal either the numerical split on the jury or the position of the majority. *See United States v. Fiorilla*, 850 F.2d 172, 175 (3d Cir. 1988); *Government of Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979). For example, the court may address the foreperson as follows:

Advise me of the status of deliberations. If the jury is divided, I do not want to know the numbers or the direction. I only want to know whether in your judgment there is a reasonable probability that the jury can arrive at a unanimous verdict in this case if sent back for further deliberations.

Second, if the foreperson indicates that the jury is deadlocked, **the court should question each juror**, asking “Do you agree that there is a hopeless deadlock which cannot be resolved by further deliberations?”

Third, **if jurors’ answers reflect that they are deadlocked, the court should excuse the jury and hold a hearing with counsel and the defendant**. The court should elicit the positions of all the parties, taking particular care to get a record of the position of the defendant(s) and defense counsel on whether to declare a mistrial. If the court declares a mistrial that is not required by manifest necessity, the Double Jeopardy Clause will bar a retrial of the case unless the defendant consented to the mistrial. *See United States v. Dinitz*, 424 U.S. 600

⁹ Dr. Wecht recognizes that the model instructions are not formally approved by the Third Circuit. They are, however, instructive, and the Court referred to them throughout the trial.

(1976); *United States v. Rivera*, 384 F.3d 49 (3d Cir. 2004). When the defendant does not consent to the mistrial, the courts consider a number of factors to determine whether the mistrial represents an abuse of discretion and whether it bars further prosecution:

1. a timely objection by the defendant;
2. the jury's collective opinion that it cannot agree;
3. the length of jury deliberations;
4. the length of the trial;
5. the complexity of the issues presented to the jury;
6. any proper communications between the judge and jury;
7. the effects of exhaustion and the impact of coercion of further deliberations on the jury.

If the court concludes that a mistrial is necessary, **the court should make an explicit finding of manifest necessity**. For example, the court may state:

Based on an evaluation of the following factors (*state factors relevant to case*), I find that the jury is unable to reach a verdict, that further deliberations would be futile, and that there is no alternative but to declare a mistrial for reasons of manifest necessity and to dismiss the jury.

Fourth, the court should call the jury back into the courtroom and discharge the jurors.

Comment to Model Criminal Jury Instruction 9.06 (citations omitted) (*italicized emphasis original, bold emphasis added*). In the same comment, the drafting committee made clear how important such procedural safeguards could be: "If the court declares a mistrial that is not required by manifest necessity, the Double Jeopardy Clause will bar a retrial of the case unless the defendant consented to the mistrial." *Id.*

The Court did not comply with any of the mandatory provisions of Rule 26.3 before declaring a mistrial on April 8, 2008. When the Court received the final jury note and called all counsel and parties into court on April 8, 2008, the Court did not give counsel for both the government and Dr. Wecht the opportunity to comment on the proposed mistrial order. To the

contrary, the Court began the proceeding by telling everyone in the courtroom to be quite throughout, to offer no motions or objections and to leave if they would not comply with the silence directive. (April 8, 2008, Tr. at 2) Similarly, and in the same way, the Court did not ask or allow counsel for either party to state whether he consented to the proposed mistrial order. Likewise, the Court did not ask or allow counsel to suggest alternatives to the mistrial.

While the model jury instructions are not binding, they are instructive, and they highlight the Court's error. First, when the jury sent its final note, the Court did not question the foreperson in any way, much less in the manner suggested by the commentary to the model instruction. Second, the Court did not poll the individual jurors by asking "Do you agree that there is a hopeless deadlock that cannot be resolved by further deliberations?" The Court asked nothing of any of the jurors. Third, the Court did not hold a hearing with counsel and the defendant to solicit their consent (or objection) or to solicit their views on alternatives to a mistrial. Indeed, the Court's silence directive incapacitated defense counsel from objecting prior to the declaration of a mistrial. Fourth, the Court made no finding on the record that there was a "manifest necessity" for a mistrial.

Regardless of which authority one examines, the conclusion is inescapable that the Court improperly entered the mistrial order in this case.

B. The government bears responsibility for the Court's failure to comply with the mandatory provisions of Rule 26.3.

While Dr. Wecht need not demonstrate that either the Court or the government was "at fault" for the impropriety of the mistrial order, it is worthwhile briefly to consider the issue.

The Third Circuit has held that the burden rests with the government to prove that "under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial." *Rivera*, 384 F.3d at 56. In the same opinion, the court of appeals described that burden as "heavy." *Id.*

Here, however, counsel for the government stood mute and allowed the Court to improperly declare a mistrial — an error the consequence of which was to impose a double-

jeopardy bar on any attempt by the government to retry Dr. Wecht. Indeed, if the government wanted to retry Dr. Wecht, and it clearly had a formed intention to do so without regard to the numerical split in the jury, it had the antecedent obligation to ensure that any mistrial was properly declared and done in compliance with Rule 26.3 and the case law. AUSA Stallings, the government's lead counsel, clearly had the opportunity to do so. Before the Court entered the mistrial order and discharged the jury, he asked AUSA Stallings if the government intended to retry Dr. Wecht. (April 8, 2008, Tr. at 3 (the Court asks AUSA Stallings "Does the government have a decision today whether the government will retry the defendant?"); Tr. at 8. Rather than rushing to tell the Court and the first jury (which had yet to be discharged and which was still sitting in the courtroom) that the government desired to retry Dr. Wecht, AUSA Stallings could and should have told the Court that the procedure being followed was in violation of Rule 26.3 and that the consequence likely would be that the government would be barred from retrying Dr. Wecht. By ignoring the procedural irregularity and immediately indicating the formed and hasty decision to retry Dr. Wecht, AUSA Stallings ratified the improper process and lead the Court to error. Of course, it would not have been too late at that point to poll the first jury individually, to consult with counsel and to consider alternatives to a mistrial.

Notably, the mandatory requirements of Rule 26.3 should not have been a surprise to the government, and the illustrative language in the model instruction provided a plain model for the Court to follow. The model instructions had been prominently referred to and used throughout the case. When the jury sent a note to the Court the week before the mistrial and indicated that it thought itself deadlocked at that time, the Court specifically told counsel that it intended to follow the suggestion of this Court's Model Criminal Jury Instruction 9.05 (indeed, the Court identified the page number in the Third Circuit's publicly posted PDF document of the model rules). (April 3, 2008, Tr. at 3-4) On that date, the Court essentially followed the suggestions of the comment to Model Criminal Jury Instruction 9.05 ("Deadlocked Jury – Return for Deliberations").

The jurors went back and deliberated for several additional hours over two days (and had an intervening three-day weekend to reflect on their positions and, perhaps, to find agreement).

When the Court received the final note from the jurors, the Court might have referred to (or the government might have referred the Court to) Model Criminal Jury Instruction 9.06, which begins with the following: “If the jury indicates that it is still deadlocked after the court has given instruction 9.05, the Committee recommends the following procedure be followed and recorded.”¹⁰ Model Criminal Jury Instruction 9.06 sets out a procedure designed to insure compliance with Fed. R. Crim. P. 26.3. The Court did not, however, heed the instruction or the rule. And the government, which should presumably have been familiar with Rule 26.3, with Model Criminal Jury Instruction 9.06 and with the fact that it would bear the burden of proving that the mistrial was properly declared in order to be permitted to retry Dr. Wecht, did nothing other than announce its hasty decision to retry Dr. Wecht.¹¹

Simply stated, if the government is aggrieved that Dr. Wecht’s constitutionally safeguarded right to avoid double jeopardy will now interfere with its plans for a retrial, it should (but likely will not) acknowledge that it bears significant responsibility for the improper mistrial.¹²

¹⁰ Of course, the first clause tracks this case perfectly.

¹¹ It is of no moment that the Court complied with certain of the requirements of Rule 26.3 during the April 3, 2008, proceedings. On that date, the Court sent the jury back to deliberate and it did so for two additional days (as well as having a three-day weekend to reflect on the case) before it sent its final note. It would make no sense to suggest that the April 3 procedure somehow “saves” the April 8 mistrial order when there was additional deliberation between the two and when the Court’s response to the April 3 procedure plainly was that the jurors should deliberate more.

¹² The government cannot be heard to argue that Dr. Wecht is somehow precluded from making his current challenge because he made an earlier motion for a mistrial. Dr. Wecht filed a motion seeking a mistrial on Friday, April 4, 2008. The Court denied Dr. Wecht’s motion on Monday, April 7, 2008. A similar issue arose in *Rivera*. In that case, on February 20, 2003, the defense moved for a mistrial. The district judge denied the motion. The district judge declared a mistrial on February 23, 2003, and tried to justify it by referring to the defendant’s earlier motion, which the judge had already denied. In the subsequent appeal, the government argued

C. As a consequence of the Court's improper entry of a mistrial, the government is precluded by the Double Jeopardy Clause from retrying Dr. Wecht.

As the Third Circuit held in *Rivera*, the consequence of an improperly entered mistrial order is that the Double Jeopardy Clause bars a retrial. 384 F.3d at 56. The error here was not some modest, hypertechnical one. Rule 26.3 is a procedural rule that is inextricably intertwined with a critical constitutional right. As the Third Circuit has written, "trial judges may declare a mistrial without barring reprosecution only in extraordinary circumstances." *United States ex rel. Russo v. Superior Court of N.J.*, 483 F.2d 7, 13 (3d Cir. 1973); *Rivera*, 384 F.3d at 55.¹³

The mistrial order here was unquestionably improperly entered, jeopardy attached and there can be no retrial.

There is one other line of authority Dr. Wecht should and will address.

In *Perez*, the Supreme Court considered a mistrial caused by a hung jury. The Court found that there was "manifest necessity" for the mistrial and, so, concluded that a retrial would not offend the Fifth Amendment. 22 U.S. (9 Wheat) at 580. In *Arizona v. Washington*, 434 U.S. 497 (1978), the Court held that "without exception, the courts have held that a trial judge may discharge a *genuinely* deadlocked jury and require the defendant to submit to a second trial."

that the defendant could not argue double jeopardy because he moved for a mistrial. The Third Circuit responded as follows:

We reject the Government's contention that the defendants requested the mistrial at issue here.... [D]efendants did not request the mistrial declared on February 24, which provides the basis for the present double jeopardy claims. The mistrial they had earlier sought was flatly denied by the District Court on February 20.

The same is true here. Dr. Wecht moved for a mistrial on April 4, 2008, the Court denied the motion on April 7, 2008, and it sent the jurors back to deliberate further. The mistrial at issue here, the one the Court entered on April 8, 2008, was not the mistrial Dr. Wecht sought, and it was indeed raised *sue sponte* by the Court. *Rivera* is binding; Dr. Wecht's earlier motion is not relevant.

¹³ The reasons for this strict principle are many, and Dr. Wecht will not seek to enumerate them here. However, at their foundation is the defendant's "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). That right is one held by the individual defendant, and it is a right independent of the public right to a fair trial. *See Rivera*, 384 F.3d at 53-54.

434 U.S. at 509 (emphasis added). Still later, in *Richardson v. United States*, 468 U.S. 317 (1984), the Court reiterated the principle.¹⁴

That line of cases does no harm to Dr. Wecht's position here. The most that can be said of them is that they hold that, assuming there to be a proper determination that there was a hung jury, that fact will allow a retrial without a double-jeopardy issue. None of the cases involved questions about whether the jury truly was deadlocked and whether the trial judge properly confirmed that there was no alternative to the exceptional entry of a mistrial (of course, all were decided before the enactment of Rule 26.3 in 1993). In this case, we do not know the answer to the first question because the answer to the second question is that the Court did not follow mandatory procedures to insure that a mistrial was the only choice.

Arizona v. Washington supports this distinction. The Court noted that much of the deference to trial judges given in hung-jury situations arises from the presumption that "the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." 434 U.S. at 510 n.27. However, the Court went on to make the following important point: "If the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by the appellate court disappears." *Id.* Put another way, the trial judge's determination is entitled to deference only if he actually exercised discretion in some meaningful way. Here, Rule 26.3 *mandates* how the court's discretion is to be guided when considering the important question of whether to enter a mistrial order, and, if the court has not complied with that rule and the cases interpreting it, the judge cannot be said to have exercised his discretion in any way worthy of deference.

¹⁴ Notably, however, in *Richardson*, the Court was considering (and rejecting) the defendant's proposition that a hung jury is the equivalent of an acquittal for double-jeopardy purposes. There was no question raised about the process the district court engaged in to determine that the jury was, in fact, irretrievably deadlocked.

Here, the Court failed to comply with Rule 26.3's mandatory requirements for determining if there was, in fact, a hung jury and "manifest necessity" for a mistrial. The Court's error, uncorrected by the government, leads ineluctably to the conclusion that the government may not retry Dr. Wecht without violating his Fifth-Amendment right to be free from being subjected twice to jeopardy for the same alleged offenses.¹⁵

CONCLUSION

Dr. Wecht has a right to be tried *once* for the criminal allegations made against him and to have one jury consider and resolve those charges. This was a long, contentious and extremely expensive trial for Dr. Wecht, whose financial resources have been significantly depleted by this multi-year ordeal which failed to secure a conviction on a single count. Before the Court could reasonably end that trial by the extraordinary step of declaring a hung jury and a mistrial and immediately relegating Dr. Wecht to yet another expensive and stressful trial, the Court was obligated to comply with mandatory steps to insure that there truly was no alternative. The Court did not do so, and the government – which bears the burden of proving that it should be allowed to retry Dr. Wecht notwithstanding the Double Jeopardy Clause – stood by and allowed the Court to make its determinative error.

The Court should grant this motion, dismiss the indictment and hold that the government is precluded from further prosecuting Cyril H. Wecht in violation of the Double Jeopardy Clause of the Fifth Amendment.

¹⁵ Dr. Wecht is aware of only one other decision addressing the precise question addressed here. In a non-precedential, *per curiam* opinion entered on January 11, 2008, the Eleventh Circuit found that the district judge's failure to heed Rule 26.3 and to consult with counsel rendered a mistrial order based on a hung jury improper. *See United States v. Felton*, No. 07-13447, 2008 U.S. App. LEXIS 778 (11th Cir. Jan. 11, 2008). The court thus held that a retrial was barred by the Double Jeopardy Clause.

Respectfully submitted,

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Dated: April 14, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2008, a true and correct copy of **DEFENDANT'S BRIEF IN SUPPORT OF HIS MOTION TO DISMISS THE INDICTMENT AND TO PRECLUDE THE GOVERNMENT FROM FURTHER PROSECUTION IN VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY** was served by electronic filing upon:

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